89-1071

No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE LYNCH,

Petitioner,

v.

BELDEN AND COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

*John Moss, Jr.
156 E. Market, #200
Indianapolis, IN 46204
(317) 635-1945
**Counsel of Record for Petitioner*

QUESTIONS PRESENTED FOR REVIEW

Did the United States Court of Appeals exceed its jurisdiction and authority by reversing a decision of the District Court denying Respondent's Motions for a Directed Verdict where no appeal was taken from said District Court's decision, and no record was presented to the Court of Appeals reflecting said District Court's Decision.

In a 42 U.S.C. §1981 employment race discrimination case, what are the nature and quantum of facts which constitute the minimum direct evidence of race discrimination, which would require the Trial Court to instruct the Jury that, if it believed from a preponderance of the evidence that Plaintiff had been the victim of intentional race discrimination, it may find for the plaintiff, as opposed to giving an instruction based on the *McDonnell Douglas/Burdine* formula for evaluating indirect evidence.

PARTIES TO THE PROCEEDING

All present parties are named in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, George Lynch, respectively prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 16, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Lynch v. Belden*, 882 F2d 262 (7th Cir. 1989). The opinion is reproduced starting at page A-1 of the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on August 16, 1989. This Petition for Writ of Certiorari was filed within the time allowed by this Court's Order of extending time and in accordance with 28 U.S.C. §2101(c). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The texts of 42 U.S.C. §§1981 is set forth in the Appendix.

STATEMENT OF THE CASE

This action was filed on December 1, 1983 in the United States District Court, Southern District of Indiana, Indianapolis Division. Petitioner sought relief from race discrimination in employment for denial of applications for promotion from the position of Electrician to Electronic Technician.

The Petitioner is a member of the black race. Petitioner was employed by Respondent in 1968. In 1974, Petitioner completed a two-year Electronic Technician course from a school that had been approved by Respondent for its Electronic Technicians. In 1976, the Petitioner was assigned to the position of Electrician. The Electronics Technician position paid a higher wage than did the Electrician position. Electricians and Electronic Technicians serviced the same equipment. Respondent's written requirements for persons to serve as Electronic Technician are: (1) earn a diploma as an Electronic Technician in a two-year course from an approved school and (2) have two years of experience. Petitioner possesses the qualifications. Petitioner's five (5) different applications for promotion to Electronic Technician were

rejected. White persons less qualified than Petitioner were hired for said positions.

This case was tried before a Jury. The Petitioner asserted that he had been the victim of intentional race discrimination in promotion and transfer by Respondent-Defendant.

The Respondent moved for a directed verdict at the close of Petitioner's Case in Chief on the grounds that Petitioner-Plaintiff had presented no evidence of discrimination which warranted submitting the case to the Jury. The District Court denied Respondent's said Motion. At the close of all of the evidence and after both parties rested, Respondent renewed its Motion for a Directed Verdict on the grounds that Petitioner-Plaintiff had presented no evidence of race discrimination. After argument of both parties, the District Court again denied Respondent's said Motion.

The Petitioner objected to the District Court's Instruction Number 12, as follows:

> "The plaintiff objects to the Court's instruction No. 12 for the following reasons:
>
> "That instruction is an erroneous statement of the law which is prejudicial to the plaintiff in this:
>
> "It is error to instruct the Jury that the Defendant could overcome Plaintiff's prima facie case which was made with direct evidence of discrimination by disparate treatment by articulating a legitimate nondiscriminatory reason for such decision. This is an inaccurate statement of the law which is prejudicial to the Plaintiff.

> "With respect to the direct evidence of discrimination, it is the Jury's duty to determine whether or not plaintiff has proved its case by a preponderance of the evidence.
>
> "The Defendant cannot overcome direct evidence of discrimination by articulating a legitimate nondiscriminatory reason therefor."

The jury returned a verdict, adverse to Petitioner, on May 16, 1988. The District Court entered judgment dismissing Petitioner's case. Immediately, Petitioner prosecuted his appeal to the United States Court of Appeals for the Seventh Circuit. In the Court of Appeals, the Petitioner appealed the District Court's ruling in which said District Court overruled the Plaintiff-Petitioner's objections to Court's Instructions Eleven (11) and Twelve (12) and read the same to the Jury. The transcript of the Record necessary for a decision thereon was presented. No appeal was taken by Respondent from the decisions of the District Court denying Respondent's Motions for a Directed Verdict. Also, on appeal, no question was raised with respect to the legality of the District Court's Decision denying Respondent's Motions for a Directed Verdict.

The Petitioner appealed the District Court's decision to read its Instruction Number Twelve (12) to the Jury over Petitioner's objections. On appeal to the Court of Appeals, Appellant-Petitioner presented that portion of the transcript necessary to a decision. The Appellant did not argue on appeal that a finding or conclusion of the District Court is unsupported by the evidence.

The United States Court of Appeals for the Seventh Circuit appears to agree with Petitioner's argument that the District Court's Instruction Number Twelve (12) was erroneous

and constituted an inaccurate statement of law. Notwithstanding that apparent decision, the District Court exceeded its jurisdiction by going forward to decide that the Petitioner presented no evidence of direct discrimination before the District Court. That question was not presented to the Court of Appeals. Also, no appeal was taken from the District Court's ruling denying Respondent's Motion for Directed Verdict.

On August 16, 1989, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's Decision. Petitioner Lynch seeks review on Writ of Certiorari of the decision of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS ACTED IN EXCESS OF ITS JURISDICTION BY REVERSING A DECISION OF THE DISTRICT COURT WHICH WAS NOT APPEALED TO IT; ALSO, THE RECORD OF THE DECISION OF THE DISTRICT COURT WAS NOT BEFORE THE COURT OF APPEALS. THE CASE SHOULD HAVE BEEN REVERSED AND REMANDED TO THE DISTRICT COURT.

The Court of Appeals affirmed the District Court's decision in general. However, in order to reach the conclusion affirming the District Court, it was necessary to reverse the District Court's decision denying Respondent's Motions for Directed Verdict. The District Court's decision on Respondent's Motions for a Directed Verdict was not appealed to the Court of Appeals for review.

The Court of Appeals, at a minimum, should have remanded this case to the District Court for the District Court's decision on whether the Petitioner presented direct

evidence of discrimination, especially since the entire record was not before the Court of Appeals and the District Court's decision denying Respondent's Motions for Directed Verdict had not been appealed.

The Court of Appeals' decision reversed the District Court's decision denying Respondent's Motion for a Directed Verdict, which motion was made on the ground that Petitioner had presented no evidence of discrimination. No appeal had been taken from the District Court's decision regarding these Motions for a Directed Verdict. Also, only questions of law were presented on appeal. Also, on appeal, Appellant did not argue that a finding or conclusion was not supported by the evidence or is contrary to the evidence. On appeal, Appellant-Petitioner herein presented so much of the transcript from the District Court as was necessary to a decision on the questions presented, as required by Rules of Appellant Procedure, Rule 10(b).

When the Record does not provide the reviewing Court with means of reviewing District Court ultimate delineation of a fact question, the matter should be remanded to a District Court for further proceedings. *U.S. v. Lewis*, CA Ala. 1975, 522 F2d 1367. Also see *Fischer v. U.S. Dept. of Justice* (CA5) (La.) 1985, 759 F2d 461.

The Court of Appeals has no jurisdiction to save to correct errors of record that are properly presented to it. (Emphasis Added.) *Products Corp. v. Sonotone Corp.*, (CA, NY, 1956), 231 F2d 867 *Cert. Den.* 77 S.Ct. 104.

THE DECISION OF THE COURT OF APPEALS THAT PETITIONER PRESENTED NO DIRECT EVIDENCE OF DISCRIMINATION IS IN CONFLICT WITH RULING PRECEDENT OF THIS COURT, *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775; ALSO, IT IS IN CONFLICT WITH DECISIONS FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

Petitioner in the instant case did present direct evidence of discriminatory intent in the form of conduct and actions (emphasis added) of the employer, Respondent herein, reflecting a racial discriminatory attitude toward petitioner. *Hill v. Metropolitan Board*, 841 F2d 1533, 1539.

Petitioner's evidence of discrimination may be summarized as follows:

Respondent employed white persons, who were applicants for five different Electronic Technician positions (1974, 1977, 1982, 1983, and 1986) for which petitioner applied but was rejected. Said white applicants either: (1) had no experience with respondent; (2) had less experience with respondent; or (3) in some instances were not qualified for the Electronic Technician positions according to Respondent's job requirements.

Also, two of respondent's white incumbent Electronic Technicians testified that in their opinions, Petitioner could do the Electronic Technician work and that he was as good as or better than certain of the white applicants to the Electronic Technician positions who were hired as Electronic Technicians over Petitioner. Also, at least six (6) white applicants for the other crafts positions did not possess the qualifications for said positions, but were hired.

Petitioner was the only person who was not permitted to speak at a Respondent employees public meeting, which was called to allow employees to voice their grievances against Respondent. Petitioner was told by his supervisor to stop telling black employees to apply for higher paying positions and skilled labor jobs with Respondent. White employees were not given this instruction. Petitioner was instructed by his supervisor not to help the only other black skilled trades person for Respondent, Evelyn Sellers. Petitioner was not told not to help white employees; other white employees helped one another and were not told by Respondent not to do so.

The Petitioner was tracked around the plant by Respondent; white employees were not followed. Respondent assigned Petitioner jobs requiring heavy lifting and unsafe jobs much more frequently than white Electricians and Electronic Technicians were assigned such jobs. Also, Petitioner was directed to perform a job alone that required two or more persons. White employees were not asked to perform said job alone.

Respondent denied Petitioner the benefits of Respondent's written policy on seniority benefits and the Respondent's written policy of promoting incumbent employees before going outside seeking new employees (T.III-66-69).

The following is sufficient direct evidence of discrimination by Respondent, against the Plaintiff, to support a Finding or a Jury verdict that racial animus motivated Respondent's decision to deny Petitioner's applications for promotion to the Electronic Technician position in 1974, 1977, 1982, 1983, and 1986.

1. Respondent gave Petitioner's job activity extreme scrutiny by following him as he went from job to job around the plant. White employees were not followed;

2. Respondent talked to the Petitioner-Plaintiff in a crude and negative manner, as though Petitioner is nobody. White Electronic Technicians and Electricians were treated in a civil and cordial manner;

3. Respondent assigned Petitioner-Plaintiff the major portion of heavy and dirty work;

4. Respondent forbade Plaintiff to assist the black Electronic Technician, Evelyn Sellers, with her assignments (while all white Electronic Technicians and Electricians were allowed to assist one another freely);

5. Respondent forbade Petitioner-Plaintiff to encourage and tell black employees to apply for higher paying jobs and skilled labor jobs; this restriction was not placed on white employees;

6. Respondent denied Petitioner-Plaintiff the right to speak at the employee public meeting, which was called to allow employees to discuss their grievances and attitudes toward management; and thereafter, Respondent stated to Petitioner-Plaintiff that he was not allowed to speak because Respondent was afraid that he would express his feelings about not being promoted to Electronic Technician; the Petitioner-Plaintiff had told Respondent that in his view, he had not been promoted to Electronic Technician because of Respondent's racial prejudice against black persons.

The quantum of direct evidence of discrimination in this case is comparable to or exceeds the direct evidence that was shown in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775; *Lee, U.S. of America*, Plaintiff Intervener *and America Civil, etc. v. Russell County Board of Education*, Defendant-Appellees, 684 F2d 769 (1982); and *Hill v. Metropolitan Rapid Transit Authority*, 841 F2d 1533 (11th Cir. 1988).

The Plaintiff-Petitioner applied for Electronic Technician jobs in 1974, 1977, 1982, 1983, and 1986. Each application was denied, and in each instance a white person who had less experience with Respondent was selected (T.III-20). In 1983, the Electronic Technician vacancy was filled by a white person from outside the plant. It was necessary for that person to go through a learning process of the various types of machines that Respondent's Electronic Technicians repaired and maintained. There are many different functions in the various types of machines, so the learning process is necessary (T.III-21-22). Petitioner had worked with said equipment since 1968 and serviced it since 1976.

Evelyn Sellers, black female, testified (T.I-3): George Lynch encouraged me to apply for the Electronics Technician Apprentice position (T.I-4-5). Petitioner promised to help me with the educational part of the job (T.I-5-6). Petitioner helped Evelyn Sellers through the course (T.I-6). The material that Petitioner gave to her helped her through the course. Also, Petitioner was very much help to Evelyn Sellers in performing her duties as an Electronics Technician (T.I-6). He would explain problems to her that she did not understand. Also, he showed her how to do certain portions of the job (T.I-6-7). After Evelyn Sellers became a Journeyman Electronic Technician, she was told by Larry Fisher, her boss, that if she needed help to get someone to help her other than Plaintiff, George Lynch (T.I-8). George Lynch was the only black Electrician or Electronic Technician.

Larry Fisher, a white male, Evelyn Sellers' boss, never told the white Electronic Technicians and Electricians not to help one another (T.I-12). Larry Fisher instructed Evelyn Sellers not to ask George Lynch to help her solve Electronic Technician problems. She was then an Electronic Technician who had completed her apprenticeship program and she was a full Journeyman (T.I-14). She followed the instructions and did not

ask Lynch to help her (T.I-15). She passed up fifteen to twenty opportunities to talk to Lynch about Electronic Technician problems (T.I-15).

Petitioner received more undesirable assignments than white Electricians and Electronic Technicians, such as installing heavy motors (T.I-21, L.14-1-6 and 21-22). Also, recently Petitioner has not been assigned the desirable building jobs, which allow him to build his skills (T.I-22-23). That is a job of which you can be proud as opposed to a minimouse job.

Larry Fisher did not assign Petitioner the jobs that permitted Petitioner to build his skills (T.I-23).

Fisher, the boss, followed Lynch around from place to place (T.I-24). Evelyn Sellers observed Larry Fisher following Petitioner in uncommon places of the plant. It was not a regular route to walk through.

Petitioner, since 1982, has performed the tasks that are performed by Electronic Technicians, and he has done so on a regular basis (T.I-28-29) and I know of no electronic technician job at Belden that Petitioner could not do (T.I-29). George Lynch can perform the Electronic Technician job at Belden (T.I-29). Lynch is watched more than the Electronic Technicians and Electricians (T.I-29).

George Lynch has worked with the Electronic Technicians, who are white, in solving Electronic Technician problems (T.I-30). I saw George Lynch solve the problem for J. McKinley, who is a white Electronic Technician. He had been working on the problem a half-day before George Lynch came and solved the problem. This occurred in 1986 (T.I-31).

I saw Lynch assist Bryce Martin, a white Electronic Technician, in solving Electronic Technician problems at

at Respondent's plant in Richmond, in about 1987 (T.I-32), including a pre-heater in front of Larry Fisher's office in 1986 (T.I-34).

Before Evelyn Sellers, George Lynch was the only black person in Electronic Technician at Belden, and no blacks are supervisors. No blacks other than the Petitioner and Evelyn Sellers are in skilled trades, and no other blacks have ever been in skilled trades at Belden (T.I-63).

Petitioner, George Lynch, was instructed not to help Evelyn Sellers, a black Electronic Technician (T.I-9). It was a common practice at Respondent's facility for Electronic Technicians and Electricians to help one another (T.I-10, T.II-6-7). George Lynch was given undesirable work assignments over and over, and much more so than white Electricians (T.I-20). George Lynch received the dirty and heavy work on a much more frequent basis (T.I-20).

White Electricians were never told not to talk to one another about solving problems (T.II-7). George Lynch has performed Electronic Technician jobs at Belden (T.II-7). White Electricians testified that George Lynch has a good basic knowledge of electronics (T.II-7).

On five (5) different occasions (1974, 1977, 1982, 1983, and 1986) George Lynch, Petitioner, applied for and was denied promotion to the Electronic Technician job (T.III-77). In each instance a white person was hired who was less qualified than Petitioner.

George Lynch advised Respondent that it was using the wrong kind of fuses in its electric equipment and that the fuses were "blowing out." The Respondent took no action. A few

years later, a white Electronic Technician mentioned the problem to Respondent, and Respondent changed to another fuse (T.II-8).

George Lynch, Petitioner, recommended that safety switches be put on all of the Respondent's "highlifts." This was done.

Jim McKinley, a white Electronic Technician for Respondent, testified that George Lynch, Petitioner, has the ability to perform as an Electronic Technician. He testified that George Lynch was as good as the white persons who were hired as Electronic Technicians at the time George Lynch applied. Also, George Lynch was an incumbent employee for Respondent who needed no orientation. New hires at Respondent's Richmond, Indiana plant need a period of orientation in order to work on Respondent's equipment (T.II-17).

Plaintiff-Petitioner had the schooling required by Respondent to work as an Electronic Technician (T.II-32) and two years of experience (T.II-41; T.II-57).

Also, Bryce Martin, a white respondent Electronic Technician, testified that Petitioner could perform the Electronic Technician job better than one Mr. Bymaster, a white person who was hired as an Electronic Technician over Petitioner (T.II-58; T.II-67).

Petitioner serviced Respondent's electronic equipment (T.II-62). The managers of some departments thought Petitioner was an Electronic Technician.

Plaintiff was required to work as an Electronic Technician. Respondent hired a white person, Bryce Martin, as an Electronic Technician who did not meet the Respondent's minimum qualifications (T.II-71).

Plaintiff's boss followed him around daily for one and one-half months. White employees were not treated in this fashion (T.II-90).

In 1986, a white person was employed as Electronic Technician, Duge Pentecart. Plaintiff's Electronic Technician ability was superior. Larry Fisher, the same person who followed or tracked Petitioner around Respondent's plant, selected Duge Pentecart and not Petitioner.

Another white person was hired as Electronic Technician after eleven months experience as an Electrician. Plaintiff had ten years experience as Electrician, but he was not given the benefit of that experience (T.II-95; T.II-96) (pl's ex K).

Plaintiff's white manager, Jim Bright, told Plaintiff to stop encouraging blacks to apply for higher paying jobs in skilled trades (T.II-101). Plaintiff was required to do the heavy and more dangerous jobs much more frequently than whites (T.II-104-105). When Petitioner asked his supervisor, Larry Fisher, about this practice, Petitioner was told, "Well, George, that's the way it is; if you don't like it, you can go to my boss." His boss was a white person who had denied Petitioner promotion (T.II-106). Petitioner was asked to do a heavy job alone, which job was normally done by two persons or more (T.II-107-108). White persons were not asked to perform that job alone.

Larry Fisher, Petitioner's boss, instructed Petitioner not to help Evelyn Sellers, the black Electronic Technician, with Electronic Technician problems (T.II-109). White Electronic Technicians were not told not to help one another. Also,

Petitioner was told not to help white Electronic Technicians ((T.II-110). Also, the work the Petitioner helped Evelyn Sellers with was within his job description as an Electrician (Pl. Ex. K) (T.II-110, L.13-19).

Also, Petitioner was asked by Larry Fisher to go on night shift to help Duge Pentecart, a white Electronic Technician who was hired over Petitioner in 1986 (T.II-111).

Larry Fisher talked to Petitioner like Petitioner was nobody; Larry Fisher did not talk to whites in this manner (T.II-111-112). Larry Fisher gave Petitioner an undeserved low rating (T.II-112). Larry Fisher gave white Electronic Technicians and Electricians higher evaluations. Petitioner was more qualified than Bill Abnay, a white person who was selected as Electronic Technician over him (T.II-115), and Bill Abnay was hired as an Electronic Technician before he finished the required two years schooling. Petitioner was not selected Electronic Technician, although he possessed all qualifications.

Respondent gave white employees who applied to be Journeymen Craftsmen credit to that status for services performed in related crafts at Belden (T.II-123-125). Petitioner was denied credit for such service (T.II-132-133).

Petitioner did offer evidence to show the private electronic technician work that he performed (T.II-152-155).

William Beach, a white person, was hired by Respondent as a Pipe-Fitter, although said William Beach was not qualified by Respondent's requirements. Beach had no license, no schooling, and no experience as an industrial Pipe-Fitter (T.III-5). Beach was hired in 1986 or 1987. Respondent gave Eddie Geier, a white person, credit for related mechanical work

toward his Journeyman's degree (T.III-6-7, 8). No rules were waived for Petitioner.

Beverly Shepler, a white female, was not qualified for the position she held. Her job required a college degree, which she did not hold. The Respondent was aware of this lack of degree but allowed Beverly Shepler to continue to hold the position, after learning that Beverly Shepler had falsified or misrepresented a material fact on her application (T.III-9-12; T.III-13-14).

William McConoha, Respondent's white employee, became a Millwright without two years experience, as required by the job qualifications, and without two years of schooling (T.III-15-17).

Petitioner was the only person who was not allowed to speak at a meeting that was called to give employees a chance to express their attitude or grievances toward Respondent. When Petitioner raised his hand, the white person presiding told him, "George, we'll take care of that personally." (T.III-19, L-11). Later, Petitioner was told that he was not allowed to speak at the public meeting because Respondent thought that Petitioner was going to raise the subject of the Electronic Technician jobs that he did not get and Respondent didn't want that aired in the open of this public meeting (T.III-20, L-14-16).

Malcom Terrell, a white person, was hired as a Pipe-Fitter by Respondent. He did not qualify according to Respondent's requirements of schooling and experience (T.III-22).

No job requirement was ever waived for Petitioner by Respondent as Respondent did for white employees (T.III-27).

Junior Duffield, a white person, was hired by Respondent as a Pipe-Fitter, although he did not have the schooling and experience required by Respondent for the position (T.III-30-32).

Harold Gay Hays, a white employee, was accepted into the apprenticeship program over Petitioner, although Plaintiff had more seniority than Harold G. Hays. Seniority was the only determining factor; the person with the most seniority should have been selected and placed into the program (T.III-35-36).

A white employee did not complete the apprenticeship program within the time allowed; the time for completing an apprenticeship program was extended by the Respondent (T.III-40). No rule regulating qualifications for Electricians or Electronic Technicians was ever waived or relaxed for Petitioner's benefit.

Also, Respondent, by hiring a white person, Tim Cox, over Petitioner, violated its policy of first hiring from within Respondent's workforce (T.III-54, 66, 69).

Petitioner was not given the benefit of his seniority, as required by Respondent's rules, when being considered for promotion; white employees were (T.III-66). Neither was Petitioner given credits over white persons off the street who applied for Electronic Technician positions (T.III-66, 69, L-11-14).

Electronic Technicians earn fifty-nine cents (59¢) per hour more than Electricians.

PART II OF THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN *Patterson v. McClean Credit Union*, 109 S.Ct. 2363 (June 15, 1989), IN THAT EVIDENCE OF RACIAL HARASSMENT MAY BE CONSIDERED IN DECIDING WHETHER AN EMPLOYER HAS BEEN GUILTY OF DISCRIMINATION IN PROMOTION.

In *Patterson v. McClean*, supra, this Court held that harassment claims are not actionable under 42 U.S.C. §1981; it did not hold that evidence of harassment may not be considered when deciding whether an employer has been guilty of discrimination based on race in promotion and transfer. Instead, in *Patterson*, supra, the Court held that "racial harassment may be used as evidence that a divergence in the explicit terms of particular contracts is explained by racial animus . . . evidence of racial harassment in the workplace may show that the employer, at the time of the formation, was unwilling to enter into a nondiscriminatory contract."

CONCLUSION

The foregoing summary and more detailed recitation of the direct evidence of discrimination illustrates that the decision of the Court of Appeals that Petitioner presented no direct evidence of employment discrimination is in conflict with both this Court's decision in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989) and the decisions of the Eleventh Circuit Court of Appeals in *Lee, U.S. of America*, Plaintiff Intervenor, and *America Civil etc. v. Russell County Board of Education*, Defendant-Appellees, 684 F2d 769 (1982), and *Hill v. Metropolitan Rapid Transit Authority*, 841 F2d 1533 (11th Cir. 1988).

For the foregoing reasons, Petitioner urges that a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

John Moss, Jr.
MOSS & WALTON
156 E. Market, #200
Indianapolis, IN 46204
(317) 635-1945

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 88-2171

GEORGE LYNCH,

Plaintiff-Appellant,

v.

BELDEN AND COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 83-C-1893—William E. Steckler, *Judge.*

ARGUED FEBRUARY 7, 1989—DECIDED AUGUST 16, 1989

Before FLAUM, RIPPLE, and KANNE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* George Lynch brought this action against his employer, Belden and Company (Belden), under 42 U.S.C. § 1981[1] alleging that Belden had dis-

[1] All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
42 U.S.C. § 1981.

criminated against him because of his race by denying him promotions and transfers and by subjecting him to racial harassment. The case was tried before a jury, and, on May 16, 1988, the jury returned a verdict in favor of Belden. Mr. Lynch appeals, contending that the district court improperly instructed the jury. We now affirm.

I.

Background

A. *Facts*

Mr. Lynch, who is black, has been employed by Belden at its Richmond, Indiana plant since 1968.[2] Since 1976, Mr. Lynch has held the position of Electrician in Belden's machine shop. The job classification of Electrician is one of several "skilled trades" positions in the machine shop at Belden's plant. Other skilled trades positions include Electronic Technician, Millwright, Pipefitter, Lathe Operator, Machinist, and Tool and Die Maker.

Mr. Lynch contends that Belden discriminated against him in a number of ways. On December 7, 1981, Mr. Lynch applied for the position of Boiler Room Operator. He maintains that Belden refused to promote him to this position solely because of his race. Similarly, on several occasions between 1973 and 1986, Mr. Lynch sought promotion to the position of Electronic Technician. He maintains that white employees with less experience than he has were placed in the positions for which he applied. Mr. Lynch also alleges that, in 1982 and 1983, he requested transfers from one position with Belden to another. He maintains that, although he was qualified for each of the positions that he sought, his transfer requests were denied solely because of his race. *See* R.8 at 2 (Plaintiff's Statement of Contentions). Finally, Mr. Lynch contends that he was subjected to racial harassment. He

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[2] Belden is primarily engaged in the manufacture and sale of electronic wire and cable products.

presented testimony that he was given heavy work assignments in hot and dirty worksites more frequently than were white employees, that Evelyn Sellers, a black Electronic Technician apprentice, was instructed not to ask him for assistance when similar instructions were not given to white employees, and that his supervisor followed him closely around the plant. Mr. Lynch maintains that white employees were not treated in a similar fashion.

Belden introduced evidence to rebut each of Mr. Lynch's claims. James Bright, Belden's machine shop and maintenance manager, testified that the Boiler Room Operator position was first offered to a black employee, who declined the job because he had decided that it would interfere with his weekend recreational activities. The job was next offered to, and accepted by, a white employee. Mr. Lynch was ranked second from last on a list of applicants for the job prepared by Belden management. The list rankings were based on the applicants' mechanical or pipefitter knowledge and their absenteeism and tardiness records.

Mr. Bright also testified that Mr. Lynch was unqualified for the position of Electronic Technician. In order to qualify for the position, an applicant was required to have had, among other things, two years' experience as an electronic technician. Mr. Lynch claimed that he had satisfied this requirement since he had repaired radios and televisions in his basement. However, he did not have a license to operate a TV repair business, as required by state law, and he was unable to produce tax records indicating that he had derived any income from operating a repair business in his home. The company also presented testimony that, each time Mr. Lynch applied for an Electronic Technician position, white employees were also rejected as nonqualified and that the applicant selected in each instance met the qualifications listed in the position's job description.

With regard to Mr. Lynch's allegation of racial harassment, Belden presented testimony that every other electrician in Mr. Lynch's department had been assigned to

the undesirable jobs complained of by Mr. Lynch. In addition, Mr. Lynch's supervisor denied that he had ever "followed" Mr. Lynch around the plant. Rather, supervisors routinely circulate in the plant and take appropriate disciplinary action when necessary. Finally, Mr. Lynch's supervisor testified that Evelyn Sellers was instructed not to ask Mr. Lynch for assistance because she was being "pushed out of the nest" as part of her apprenticeship program. *See* Tr. (Defendant's Case-In-Chief) at 155.

B. *Issues on Appeal*

Mr. Lynch contends that the district court erred in instructing the jury in this case. His arguments are based on two instructions, Instructions No. 11 and No. 12. Instruction No. 11 reads as follows:

> For the purposes of this case, 42 U.S.C., Section 1981 entitles a black person to equal opportunity and treatment in employment. Thus, when an employer fails to promote a black person because of that person's race, the law has been violated and the black person may file suit and recover damages.
>
> In order for a plaintiff to establish his claim, plaintiff has the burden of proving by a preponderance of the evidence that defendant had a racially discriminatory purpose or motive in employment decisions with regard to the plaintiff.
>
> The mere fact that the plaintiff is black and was also not promoted in his employment is not sufficient in and of itself to establish plaintiff's claim. To prove that defendant acted unlawfully, plaintiff must prove that it is more likely than not that his race was a reason the defendant failed to promote him. It need not have been the only reason.
>
> In order for the plaintiff to recover on his claim against the defendant, the plaintiff must prove the following essential elements by a preponderance of the evidence:

First: that defendant intentionally discriminated against plaintiff; that is, plaintiff's race was a motivating factor in defendant's decision not to promote the plaintiff; and

Second: as a direct result of such discrimination, plaintiff sustained damages.

Tr. (Court's Instructions and Objections Thereto) at 10-11. Mr. Lynch objected to this instruction on the ground that it did not refer to his transfer claim or his harassment claim and thus left the impression that Mr. Lynch could *only* recover if he proved that he was not *promoted* as a result of discrimination. *See id.* at 28-29.

Instruction No. 12 reads as follows:

To prove intentional discrimination, plaintiff need not prove that his race was the sole motivation or the primary motivation for defendant's employment decision. Also, plaintiff is not required to produce direct evidence of unlawful intent. It is not easy to prove motive directly because there sometimes is no way to fathom or scrutinize the operations of the human mind. Intentional discrimination, however, if it exists, is a fact which you may infer from the existence of other facts.

With respect to each of plaintiff's claims, in deciding whether the defendant intentionally discriminated against the plaintiff because of his race, you should first consider whether plaintiff has established the following elements:

First that George Lynch is black;

Second, that George Lynch was satisfactorily performing his job;

Third, that he was denied certain job assignments and promotional opportunities;

Fourth, the employer, Belden, chose white persons with similar qualifications or qualifications not equal to plaintiff's to perform the jobs; and

> Fifth, that George Lynch was damaged as alleged in his complaint.
>
> If you find that plaintiff has proved each of these elements, then plaintiff has proved a prima facie case. A prima facie case means that the plaintiff has sufficiently established his cause of action by a preponderance of the evidence and is entitled to a verdict in his favor unless defendant rebuts such evidence.
>
> Thus, it then becomes your duty to determine the second issue, namely, did the defendant introduce evidence showing that there was a legitimate nondiscriminatory reason why it did not promote or transfer plaintiff. If your answer on this second issue is yes, that defendant has articulated or stated his legitimate nondiscriminatory reason for its failure to promote or transfer the plaintiff, then you should decide in favor of the defendant, unless the plaintiff has also proved by a preponderance of the evidence that the defendant's articulated legitimate nondiscriminatory reason is a pretext, disguising an underlying intent to discriminate on the basis of race.

Id. at 11-13. Mr. Lynch objected to this instruction on the ground that it erroneously instructed the jury that Belden could overcome Mr. Lynch's prima facie case, which he argues was established by direct evidence of discriminatory disparate treatment, merely by articulating a legitimate nondiscriminatory reason for its actions. *Id.* at 26.

Both Instruction No. 11 and Instruction No. 12 are based on instructions tendered by Mr. Lynch himself. *See* R.43 (Plaintiff's Jury Instructions No. 1 & No. 3). In addition, Mr. Lynch tendered, and then withdrew, two instructions informing the jury that it could conclude that Belden discriminated against him if it found that Belden failed to promote or transfer him because of his race or subjected him to racial harassment. *See* R.50 (Plaintiff's Supplemental Jury Instructions No. 14 & No. 17). At oral argument, Mr. Lynch's counsel informed us that these instructions

were withdrawn because he had reached an "understanding" with the district judge that each of the claims (promotion, transfer, and harassment) mentioned in the tendered instructions would be incorporated into the instructions that the court intended to give to the jury.[3] This understanding was reached at a Friday evening instructions conference in the judge's chambers that was not transcribed for the record. Mr. Lynch's counsel maintains that, when the parties returned to court on Monday and were given copies of the instructions that the judge intended to read to the jury, he informed the court that the instructions were still unsatisfactory. The parties, however, were not given a chance to object on the record to the instructions until after they had been read to the jury. After the instructions had been read and the jury was excused, both parties made objections on the record. The court, however, decided not to make any changes in the instructions as read based on the objections that were asserted.

II.

Analysis

A. *Instruction No. 11*

As noted above, Mr. Lynch maintains that Instruction No. 11 improperly prevented the jury from considering his harassment and transfer claims and left the erroneous impression that he could recover *only* if he proved that

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[3] *See also* Tr. (Court's Instructions and Objections Thereto) at 29-30. When objecting to Instruction No. 11 after the instructions had been read to the jury, Mr. Lynch's counsel tried to remind the district judge about the prior conversation in which they had "discussed the need to include, at least from plaintiff's perspective, all of the plaintiff's claims within the instruction." *Id.* at 29. The judge apparently did not remember that this point had been raised during the conversation in chambers, *id.*, and told Mr. Lynch's counsel that he had "followed [his] tendered instruction." *Id.* at 30.

he was *not promoted* because of his race. To the extent that this argument is based on Mr. Lynch's claim that he was subjected to racial harassment, it must be rejected in light of the Supreme Court's recent decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989). In *Patterson*, the Court held that section 1981 only proscribes discriminatory conduct at the time of the initial formation of a contract and conduct that impairs the right to enforce contract obligations through legal process. *See* 109 S. Ct. at 2374. Postformation conduct by an employer relating to the terms and conditions of continuing employment, however, is not actionable under section 1981. *Id.* Because discriminatory postformation conduct, "including breach of the terms of the contract or imposition of discriminatory working conditions," *id.* at 2373, concerns the performance of existing contractual obligations and the conditions of continuing employment, it is, held the Supreme Court, more appropriately governed by state contract law and Title VII. *Id.*

Mr. Lynch's racial harassment claim is based on allegations that he received discriminatory job assignments and was singled out, because of his race, for special treatment by his supervisor. As in *Patterson*, none of the conduct that Mr. Lynch characterizes as racial harassment involves a refusal by Belden to make a contract with him or the impairment of his ability to enforce his established contract rights. *See id.* at 2374. Rather, Mr. Lynch's racial harassment claim attacks the conditions of his employment. Thus, his claim is not actionable under section 1981, and the district court's failure to include a reference to Mr. Lynch's racial harassment claim in Instruction No. 11 was not erroneous.

Mr. Lynch also contends that Instruction No. 11 is erroneous because it precluded the jury from considering his transfer claim. As a threshold matter, we note that, in the wake of *Patterson*, Mr. Lynch's transfer and promotion claims also may not be actionable under section 1981:

> [T]he question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981. . . . Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981.

Id. at 2377. Because this case was tried long before the Supreme Court's decision in *Patterson*, the record is not developed adequately in this regard. Therefore, we shall not rest our decision on this ground and shall address squarely Mr. Lynch's submission that the instructions were erroneous.

When reviewing a challenge to a jury instruction, we must view the instructions as a whole, and consider the challenged instruction "both in the context of the other instructions given and in light of the allegations of the complaint, opening and closing arguments and the evidence of record." *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 830 F.2d 716, 725 (7th Cir. 1987); *see also Fisher v. Krajewski*, 873 F.2d 1057, 1064 (7th Cir. 1989); *Vaughn v. Willis*, 853 F.2d 1372, 1376 (7th Cir. 1988). The instructions must be construed in a " 'common sense manner, avoiding fastidiousness, inquiring whether the correct message was conveyed to the jury reasonably well.' " *General Leaseways*, 830 F.2d at 725 (quoting *Wilk v. American Medical Ass'n*, 719 F.2d 207, 218 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984)). Moreover, when considering Mr. Lynch's challenge to Instruction No. 11, we must keep in mind " 'the artificiality of assuming that isolated passages in a lengthy set of instructions are apt to spell the difference between victory and defeat.' " *Id.* (quoting *W.T. Rogers Co. v. Keene*, 778 F.2d 334, 342 (7th Cir. 1985)); *see also id.* ("Just as an allegedly erroneous instruction must be viewed in the context of the full

charge and other surrounding circumstances, an allegedly erroneous omission of a sentence must also be viewed in context.").

We do not believe that the failure to include a reference to Mr. Lynch's transfer claim in Instruction No. 11, when read in the context of the entire trial, constituted error. The instructions, when read as a whole, reasonably informed the jury of Mr. Lynch's transfer claim. For example, at the beginning of its charge to the jury, the district court summarized Mr. Lynch's complaint. The court noted that "the complaint states that in 1982 and 1983, defendant failed and/or refused to transfer and/or promote plaintiff under the same terms and conditions as were afforded Caucasian employees, because of plaintiff's race." Tr. (Court's Instructions and Objections Thereto) at 7. In addition, Instruction No. 12 informed the jury that Mr. Lynch had a transfer claim as well as a promotion claim. In discussing the elements of the plaintiff's prima facie case, the court instructed the jury to consider whether Mr. Lynch had established that "he was *denied certain job assignments* and promotional opportunities." *Id.* at 12 (emphasis supplied). The jury was also instructed that, if it determined that Mr. Lynch had established a prima facie case of discrimination, it then had to decide whether the defendant had introduced "evidence showing that there was a legitimate nondiscriminatory reason why it did not promote *or transfer* plaintiff." *Id.* at 13 (emphasis supplied).

The evidence presented by Mr. Lynch at trial also supports our conclusion that the failure to mention explicitly his transfer claim in Instruction No. 11 was not erroneous. Mr. Lynch presented evidence concerning his failure to receive the position of Boiler Room Operator in December 1981 and his failure to be promoted from Electrician to Electronic Technician on several different occasions. He did not, however, present any evidence identifying any additional "transfers" that he failed to receive. This is not surprising, since Mr. Lynch's "transfer" and "promotion" claims *both* refer to his failure to receive the

Boiler Room Operator and Electronic Technician positions. *See, e.g.*, R.10 at 2; R.10, Lynch Deposition at 95-97 (claims based on refusal to transfer and failure to promote refer to failure to receive Electronic Technician position); R.13, Ex. E (Plaintiff's Affidavit in support of Plaintiff's Responsive Brief in Opposition to Defendant's Motion for Summary Judgment) (plaintiff "was not selected, promoted, nor transferred to the position of power plant operator") ("defendant refused to select, hire, promote and or transfer the plaintiff to the position of Electronic Technician"). The evidence presented by Mr. Lynch clearly informed the jury that his discrimination claims (whether characterized as refusal to transfer or as failure to promote) were based on his failure to receive these two positions. In light of the instructions as a whole, the evidence presented at trial, and Mr. Lynch's characterization of his own claims, we are satisfied that Instruction No. 11 did not misinform the jury despite the absence of any specific reference to Mr. Lynch's transfer claim in that particular instruction.[4]

B. *Instruction No. 12*

Mr. Lynch challenges Instruction No. 12 on the ground that it erroneously informed the jury that a defendant can overcome a prima facie case established by direct evidence of discrimination merely by articulating a legitimate nondiscriminatory reason for its actions. *See* Appellant's Br. at 8-11 (citing *Hill v. Metropolitan Atlanta Rapid Transit Auth.*, 841 F.2d 1533, 1539 (11th Cir. 1988); *Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982) ("[W]here a case for discrimination is proved by direct evidence it is incorrect to rely on a *McDonnell Douglas* form of rebuttal. . . . Defendant cannot rebut this type of showing of discrimination simply by articu-

[4] Because we determine that the instructions that were given were adequate, we need not address whether the district court should have given the instructions that Mr. Lynch's counsel tendered and withdrew.

lating or producing evidence of legitimate, nondiscriminatory reasons."); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (the *McDonell Douglas* burden-shifting framework "is inapplicable where the plaintiff presents direct evidence of discrimination"). This objection, however, is meritless in this case, because Mr. Lynch failed to present any direct evidence of discrimination supporting his claim that he was not promoted or transferred because of his race.

In order to prevail, a section 1981 plaintiff must prove that he has been the victim of intentional discrimination. This showing can be made either by direct proof of discriminatory intent or by the method of indirect proof described in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). *See Friedel v. City of Madison*, 832 F.2d 965, 972 (7th Cir. 1987); *see also Randle v. LaSalle Telecommunications, Inc.*, No. 88-3221, slip op. at 9 (7th Cir. May 30, 1989) ("[T]he methods and order of proof applicable to a claim of disparate treatment under Title VII are equally availing under § 1981.") (footnote omitted). Direct evidence of discriminatory intent consists of actions or remarks by the defendant that reflect a discriminatory attitude. *See Hill*, 841 F.2d at 1539; *see also Thurston*, 469 U.S. at 121 (direct evidence of discrimination available where the defendant's challenged action "is discriminatory on its face"); *Randle, supra*, slip op. at 11 ("by definition, direct evidence, if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption"); B. Schlei & P. Grossman, Employment Discrimination Law 15 & n.8 (2d ed. 1983) (noting that direct evidence of discriminatory motivation, which "is now relatively unusual," can consist of "evidence of bigoted or otherwise discriminatory statements made by the defendant's representatives"). The indirect method of proof outlined in *Burdine* and *McDonnell Douglas*, by contrast, allows a plaintiff to raise an inference of discriminatory intent even when no direct evidence is available. In order

to establish a prima facie case of discrimination by the indirect method, a plaintiff need only show, by a preponderance of the evidence, that he applied for an available position for which he was qualified, but failed to receive the position under circumstances that "give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253.[5] This presumption of discrimination can be rebutted if the defendant can produce evidence showing that "the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.* at 254; *see also McDonnell Douglas*, 411 U.S. at 802. Once the defendant has met its burden of articulating a legitimate, nondiscriminatory reason for its action, the plaintiff using the indirect method of proof can only prevail by showing that the defendant's "proffered and adequately supported nondiscriminatory rationales" are mere pretexts for discrimination. *Friedel*, 832 F.2d at 973.

Our review of the record in this case reveals that Mr. Lynch presented no direct evidence that Belden's actions were the result of discriminatory intent. Rather, Mr. Lynch presented evidence showing that he was treated differently than were white employees who applied for the Boiler Room Operator and Electronic Technician positions. *See, e.g.*, Tr. II at 70-76. Such evidence gives rise to an inference of discriminatory intent pursuant to the indirect method of proof, but does not constitute direct evidence of discriminatory motivation on the part of Belden. Because Mr. Lynch presented only indirect evidence, it was proper for the district court to instruct the jury as to the *McDonnell Douglas/Burdine* formula for evalu-

[5] *See also* B. Schlei & P. Grossman, *supra*, at 1291 ("Proof in the individual disparate treatment case . . . generally require[s] indirect evidence from which an inference of discriminatory motive may be drawn, namely, comparative evidence demonstrating that the treatment of the plaintiff differs from that accorded to otherwise 'similarly situated' individuals who are not within the plaintiff's protected group.") (footnote omitted).

ating indirect evidence.[6] Instruction No. 12 accurately informed the jury of the parties' burdens under the indirect method of proving discrimination; thus, the court did not err in giving that instruction to the jury.

Conclusion

The judgment of the district court is affirmed. Mr. Lynch's challenge to Instruction No. 11 must be rejected because his racial harassment claim is not actionable under section 1981 and because the instructions as a whole, in the context of this trial, accurately informed the jury of Mr. Lynch's promotion *and* transfer claims. In addition, Instruction No. 12 was appropriate in this case because Mr. Lynch offered only indirect evidence in support of his claim that he was not promoted or transferred because of his race.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[6] The absence of direct evidence also makes inapplicable the Supreme Court's recent holding in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989).

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United States District Court

SOUTHERN DISTRICT OF INDIANA

GEORGE LYNCH

JUDGMENT IN A CIVIL CASE

v.

BELDEN AND CO., INC.

CASE NUMBER: IP 83-1893-C

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing and that the action be dismissed on the merits.

May 16, 2988
Date

John A. Steele

Kay A. Halbert
(By) Deputy Clerk

TEXT OF 42 U.S.C. §1981

Equal rights under the law.—All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (R.S. § 1977.)

From Act May 31, 1870, c. 14, § 16, 16 Stat. 144.